Supreme Court, U.S.
FILED
JUL 19 1999
OFFICE OF THE CLERK

No. 98-2024

In The

Supreme Court of the United States

MARY and LESTER FURLOW,

Petitioners,

v.

ALLIED CONVEYOR, INC., and
DURR INDUSTRIES, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DOUGLAS S. DOVE
Counsel of Record
MICHAEL J. PITZER
RABBITT, PITZER & SNODGRASS, P.C.
800 Market Street
St. Louis, Missouri 63101
(314) 421-5545

*Counsel for Respondent
Durr Industries, Inc.*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit Court of Appeals properly affirmed the District Court's decision to enter judgment in favor of Respondent where Petitioners waived their right to object to any inconsistency between the general verdict and the accompanying interrogatories.

2. Whether the Seventh Circuit Court of Appeals properly affirmed the District Court's decision to enter judgment in favor of Respondent where the answers to interrogatories in the verdict found that Respondent was not liable and the District Court's decision to enter judgment in favor of Respondent pursuant to Rule 49(b) of the Federal Rules of Civil Procedure was not against the manifest weight of the evidence.

PARTIES TO THE PROCEEDING

The Petitioners inaccurately list the parties to the proceeding. Durr Industries, Inc., is the proper name of Respondent. Durr, Inc., is the parent corporation of Respondent and Durr, AG, is a publicly held company which owns 10 percent or more of the stock of Respondent.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	3
A. Respondent's Version	3
B. Petitioners' Statement of the Case is in Error	7
C. Proceedings in the Seventh Circuit	8
REASONS FOR DENIAL OF THE WRIT	10
A. Verdict Form	10
B. Waiver	12
C. Verdict Not Against the Manifest Weight of the Evidence	14
CONCLUSION	17

TABLE OF AUTHORITIES

Page

Cases

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962) 15

Barnes v. Brown, 430 F.2d 578 (7th Cir. 1970) 11, 12

Cundiff v. Washburn, 393 F.2d 505 (7th Cir. 1968)....13, 14

EEOC v. Century Broadcasting Corp., 957 F.2d 1446 (7th Cir. 1992)..... 15

Ellston v. Morgan, 440 F.2d 47 (7th Cir. 1971)..... 15

Turyna v. Martam Construction Co., Inc., 83 F.3d 178 (7th Cir. 1996)..... 10, 12, 14, 15

Statutes

28 U.S.C. § 1254(1) 1

735 ILCS 5/13-202..... 9

735 ILCS 5/13-214(a) 9

Rules

Fed. R. Civ. P. 49..... *passim*

Supreme Court Rule 10.....2, 11

Other Authorities

9 Wright & Miller, Federal Practice & Procedure § 2502..... 15

INTRODUCTION

Certiorari should not be granted in this case because the decision by the Seventh Circuit Court of Appeals is not in conflict with any decision of this Court or any United States appellate court. Petitioners waived their rights to object to the inconsistency of the verdict since they failed to ask the District Court to direct the jury to continue deliberating to resolve the apparent inconsistency. Further, the Seventh Circuit properly affirmed the District Court's decision that the special finding by the jury that Respondent was not liable took priority over the general verdict pursuant to Rule 49(b) of the Federal Rules of Civil Procedure.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not officially reported. Petitioners filed a Motion for Rehearing which the Seventh Circuit denied. The Memorandum and Order of the United States District Court for the Southern District of Illinois directing entry of judgment in favor of Respondent is not officially reported.

JURISDICTION

Jurisdiction over this Petition is proper pursuant to 28 U.S.C. § 1254(1). However, Petitioners fail to proffer a sufficient basis to invoke this Court's review.

Supreme Court Rule 10 provides in relevant part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> * * *
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rule 10.

Petitioners suggest that the decision of the Seventh Circuit Court of Appeals conflicts with decisions of this

Court and other United States appellate courts. Petitioners also suggest that the decision by the Seventh Circuit is a departure from the accepted and usual course of judicial proceedings. To the contrary, the Seventh Circuit's affirmance of the District Court's decision is entirely consistent with the leading authority relevant to the issues presented in this case. Moreover, Petitioners' contentions in their Petition constitute mere assertions that the District Court erroneously applied the facts to find in favor of Respondent and misapplied a properly stated rule of law.

Petitioners fail to provide any persuasive or substantive reason why the issues in this case present a conflict with decisions of other United States appellate courts or call for an exercise of this Court's power of supervision. The decisions below constitute correct applications of settled law and no conflict exists. Therefore, denial of the Petition is appropriate.

STATEMENT OF THE CASE

A. Respondent's Version

The Petitioners, Mary Furlow and Lester Furlow, brought a diversity action to recover damages for personal injuries allegedly suffered by Mary Furlow during the course of her employment at the Nascote Industries, Inc. (Nascote), plant in Nashville, Illinois. Petitioner allegedly injured herself in or about April, 1990, while removing an automobile bumper cover from a conveyor

system at the Nascote manufacturing facility. The predecessor to Nascote, Magna International, built the manufacturing plant and contracted with Respondent to install a system for painting bumper covers, which included a conveyor line.

Respondent did not supply, design, manufacture, or install a complete conveyor system for the Nascote plant. Rather, as part of its scope of work Respondent provided for a simple conveyor belt at floor level which went through the different areas of the plant where the bumpers were painted and finished. Attached to the conveyor line was a four wheel trolley which was designed and manufactured by Allied Conveyor, Inc. (Allied). The trolley held a metal rack called a bumper carrier which was designed by Nascote and manufactured by Bennett Metals (Bennett). The bumper carrier held the bumper cover in place as it traveled along the conveyor line through the painting and finishing processes. The bumper carriers were not included in Respondent's original contract, nor was Respondent responsible for their design, manufacture or installation. Respondent completed the color line system at the Nascote plant in 1987.

In 1989, Nascote designed and constructed an addition to the original plant. The new addition was a 153,000 square foot warehouse and manufacturing area. The paint line conveyor was extended into the new addition by Southern Systems, Inc. (Southern), which provided the steel structure and all new parts for the conveyor extension. Respondent was not involved with the extension of the paint line conveyor.

In or about December, 1992, Petitioners brought suit against Respondent. Petitioners alleged, in relevant part, that the design of the color line system caused or contributed to cause Petitioners' injuries. Respondent refuted Petitioners' allegations with undisputed facts that Petitioner was injured in the new warehouse constructed in 1989 by Nascote. It is also undisputed that Respondent did not design nor manufacture the specific product that the Petitioners and their expert criticized.

Following several days of trial, the case was submitted to the jury. Just before the verdict forms were returned, the jury sent the following note to the Court:

> Judge Stiehl:
>
> We are finding Mary Furlow 40% Responsible (sic) and finding Durr and Allied against Nascote. I would like to make sure we have the Form D Filled (sic) out correctly.
>
> s/*William L. Mullins*

The District Court replied to the jury as follows, without objection from the parties:

> June 2, 1997
>
> Ladies and Gentlemen:
>
> I am sorry but I cannot respond to your request. Please review the applicable instructions and apply them to your understanding of Verdict Form D, and then complete Verdict Form D accordingly.
>
> s/*William D. Stiehl*
> Judge

Subsequently, the jury returned Verdict Form D which provided as follows:

VERDICT FORM D

We, the jury, find for the plaintiffs and against the following defendant or defendants:

Allied Conveyor, Inc.	YES X	NO ___
Durr Industries, Inc.	YES X	NO ___

We further find the following:

First: Without taking into consideration the question of reduction of damages due to the fault of Mary Furlow, if any, we find that the total amount of damages suffered by plaintiffs as a proximate result of the occurrence in question is $1,750,000.00.

Second: As to the contribution claims against third party defendant, Nascote Industries, Inc., we find as follows:

For Allied Conveyor, Inc. and against Nascote Industries, Inc.	YES X	NO ___
For Durr Industries, Inc. and against Nascote Industries, Inc.	YES X	NO ___

Third: Assuming that 100% represents the total combined fault of all persons or entities whose fault proximately caused plaintiffs' injuries, including Mary Furlow, any defendant whom you have found liable and any third-party defendant you find liable, we find the percentage of such fault attributable to each as follows:

(a)	Mary Furlow	40%
(b)	Allied Conveyor, Inc.	0%

(c)	Durr Industries, Inc.	0%
(d)	Nascote Industries, Inc.	60%
	TOTAL	100%

(Instructions to Jury: If you find any defendant not liable to the plaintiff, or that any third-party defendant or non-party was not at fault in a way that proximately caused plaintiff's injury, or if you find that the plaintiff was not contributorily at fault, then you should enter a zero (0) as to that person or persons.)

Following the reading of the Verdict Form D, the District Court recognized the apparent inconsistency and instructed the parties to brief their positions relative to how the court should rule. In its written brief, Respondent requested that the District Court reconvene the jury for further deliberations if the apparent inconsistency could not be resolved pursuant to Rule 49(b). On August 6, 1997, the court entered judgment in favor of Respondents.

B. Petitioners' Statement of the Case is in Error

1. Contrary to Petitioners' assertion, the jury did not return a verdict for Petitioners and against Respondents. Rather, the jury returned a general verdict in favor of Petitioners, but answered the accompanying interrogatories by finding that Respondent was not at fault.

2. Petitioners contend that no special interrogatories were tendered by Respondents and that the District Court found that the language of the verdict form constituted a special verdict pursuant to Rule 49 of the

> Federal Rules of Civil Procedure. However, the District Court did not find that the verdict form was a special verdict. Petitioners fail to comprehend the plain meaning of Rule 49. Although Rule 49(a) states that a trial court may require the jury to return a special verdict in the form of a special written finding upon each issue of fact, no special verdict was submitted in this case. To the contrary, the District Court held that the verdict form was a general verdict with accompanying interrogatories which is specifically sanctioned by Rule 49(b). Further, Rule 49(b) dictates a specific method for the trial court to correct any apparent inconsistencies between the general verdict and the accompanying interrogatory answers.

C. Proceedings in the Seventh Circuit

The Seventh Circuit Court of Appeals held that Petitioners failed to ask the District Court to direct the jury to continue deliberating to resolve the apparent inconsistency between the general verdict and the answers to the accompanying interrogatories, and thereby waived any objection to the verdict. As a result, it was soundly within the discretion of the District Court to reconcile the general verdict with the accompanying interrogatory answer pursuant to Rule 49(b). Therefore, the Seventh Circuit affirmed the District Court's conclusion that the answers to the written interrogatories finding that Respondent was not liable took priority over the general verdict.

In reaching its decision, the Seventh Circuit did not decide whether Petitioners' claims were barred by the

applicable statute of limitations. Petitioner was allegedly injured on April 21, 1990. Personal injury actions in Illinois are governed by a two (2) year statute of limitations. 735 ILCS 5/13-202. Petitioners did not file suit against Respondent until December, 1992, more than two (2) years after the injuries occurred.

To get around their statute of limitations problem, Petitioners asserted that their claims were governed by a four (4) year statute of limitations relating to construction design, management and supervision. 735 ILCS 5/13-214(a). However, it is undisputed that Petitioner was injured in the new addition of the Nascote plant on a section of the paint line conveyor built by Southern after Respondent's work was complete. Respondent was not involved in the new addition or the construction of the extension to the paint line conveyor.

Further, Respondent was not responsible for nor involved with the design, manufacture and installation of the bumper carriers which allegedly caused Petitioners' injuries. Respondent's responsibility for design of the paint conveyor line ended with the top of the four wheel trolley. The bumper carriers which allegedly caused Petitioners' injuries were designed by Nascote and manufactured by Bennett to fit into and rest on top of the trolley. Therefore, there was nothing about the original conveyor line built by Respondent which caused or contributed to cause Petitioners' injuries.

Since Respondent did not participate in the design, planning, supervision, observation or management of construction, the four (4) year statute of limitations did not apply. Therefore, Petitioners' claims were time-barred

because they did not file suit against Respondent until two (2) years after the injury.

REASONS FOR DENIAL OF THE WRIT

A. Verdict Form

Rule 49 of the Federal Rules of Civil Procedure provides that the court may, in its discretion, submit a special verdict to the jury or submit a general verdict with written interrogatories. A special verdict under Rule 49(a) is defined as written questions upon issues of fact submitted to the jury which are susceptible of categorical or other brief answer, or written forms of special findings which may properly be made under the pleadings and evidence. Fed.R.Civ.P. 49(a). A general verdict was defined by the Seventh Circuit as one which merely asks the jury to answer the question "who won," and if a monetary award is appropriate, to answer the question "how much." *Turyna v. Martam Construction Co., Inc.*, 83 F.3d 178, 181 (7th Cir. 1996).

The preamble and paragraph First of Verdict Form D are in the form of a general verdict. However, Verdict Form D also contains special written interrogatories in paragraph Third. Rule 49(b) provides that a trial court may "submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict." Fed.R.Civ.P. 49(b).

Petitioners complain that the verdict form is not a general verdict with accompanying interrogatories. However, their arguments in the Petition are identical to those raised below. Petitioner is merely asking this Court to reconsider the prior decisions below due to a perceived erroneous factual finding or misapplication of a properly stated rule. Rule 10 is not the proper vehicle for reconsideration of the prior rulings in this case and there is no showing that the decision by the Seventh Circuit is in conflict with this Court's established precedent or other appellate court decisions.

In fact, an early case decided by the Seventh Circuit supports the proposition that Verdict Form D is a general verdict accompanied by written interrogatories. In *Barnes v. Brown*, 430 F.2d 578 (7th Cir. 1970), the jury returned a general verdict in favor of plaintiff and against defendant, and awarded plaintiff $1,000. In addition, the jury was presented with and returned a written interrogatory regarding whether plaintiff was guilty of contributory negligence. The jury answered the written interrogatory in the affirmative which constituted a bar to plaintiff's claim. *Id.* at 579.

The District Court nullified the general verdict, entered judgment on the written interrogatory, and overruled the plaintiff's motion for new trial. The Seventh Circuit affirmed, holding that the District Court's entry of judgment in accordance with the interrogatory answer comported with Rule 49(b) and was consistent with the evidence. The Court further held that when a special verdict is inconsistent with the general verdict, the former controls the latter and a court may enter judgment

accordingly unless the special finding is against the manifest weight of the evidence. *Id.* at 580.

Based upon the foregoing analysis, the District Court was correct in finding that Verdict Form D is a general verdict accompanied by interrogatories pursuant to Rule 49(b). The critical portion of Verdict Form D acts as an interrogatory, requiring the jury to resolve the factual questions of apportionment of fault and proximate cause. Rule 49(b) plainly states that the written interrogatories must be "upon one or more issues of fact the decision of which is necessary to a verdict." *Turyna*, 83 F.3d at 181. As the District Court succinctly stated, "there could be no more necessary *factual* determination than the issue of the percentage of fault among the parties." (Memorandum & Order, Appendix 13a). When the jury entered zero (0) for Respondent, it made a special finding that Respondent was not at fault in a way that proximately caused plaintiff's injury.

B. Waiver

There is no disagreement among the circuits about what constitutes waiver in situations involving a perceived inconsistency with the verdict form. Since Verdict Form D constitutes a general verdict with accompanying interrogatories pursuant to Rule 49(b), plaintiffs' failure to request resubmission of the case to the jury constitutes waiver. Therefore, the standard on review at the circuit level is whether the judgment in favor of Respondent was

against the manifest weight of the evidence. Alternatively, if plaintiffs did not waive objection to the inconsistency of the verdict, then the judgment is reviewed for abuse of discretion.

A similar situation was addressed in *Cundiff v. Washburn*, 393 F.2d 505 (7th Cir. 1968), where the jury returned a verdict against plaintiff on his claim and against defendant on her counterclaim. The jury answered the special interrogatory in the negative finding that plaintiff was not guilty of contributory negligence. *Id.* The District Court recognized the perceived inconsistency between the interrogatory answer and the general verdict and inquired whether plaintiff sought further deliberations from the jury. Plaintiff declined and the District Court proceeded to remedy the situation pursuant to Rule 49(b) by entering judgment against plaintiff. *Id.* at 506.

On appeal, the plaintiff argued that one of the parties must have been negligent and the case could not be a pure accident. The Seventh Circuit disagreed and held that plaintiff waived any objection to the verdict by failing to move for resubmission of the case to the jury. The court went on to say that:

> . . . the rule that objection on grounds of inconsistency is waived by failure to move for resubmission promotes the fair and expeditious correction of error. It requires that the error be corrected in the proceeding in which it is made, by the jury which made it, unless the trial court determines in the exercise of its discretion under Rule 49(b) to enter judgment on the special findings or to order a new trial.

Id. at 507. The Seventh Circuit held that Rule 49(b) allows the District Court wide discretion to choose the means of correcting the inconsistency. The District Court may, in its discretion, reconcile the general verdict with the special findings, resubmit the verdict and the findings to the jury, or order a new trial. *Id.*; *see also, Turyna*, 83 F.3d at 181. Unless the verdict of the jury and the judgment entered thereon are against the manifest weight of the evidence, they will be upheld. *Cundiff*, 393 F.2d at 507.

In the instant proceeding, Petitioners did not move for resubmission of the case to the jury. Rather, they moved for entry of judgment in their favor and against Respondents. As a result, Petitioners waived any objection to an apparent inconsistency between the general verdict and the special finding. Therefore, it was soundly within the discretion of the District Court to reconcile the verdict with the special finding pursuant to Rule 49(b), and enter judgment in favor of Respondent.

C. Verdict Not Against the Manifest Weight of the Evidence

Federal law governs questions of the consistency of special verdicts and general verdicts accompanied by answers to interrogatories in a trial in federal court.

> The courts have uniformly . . . refused to regard state law as controlling on the submission of special verdicts and interrogatories. State law does not govern . . . the effect of inconsistency between a general verdict and a special interrogatory, or any other detail of the special verdict and interrogatory practice.

9 Wright & Miller, *Federal Practice & Procedure* § 2502. That position was adopted by the Seventh Circuit in *Ellston v. Morgan*, 440 F.2d 47, 49 (7th Cir. 1971), and there is nothing to suggest that it conflicts with other circuits or this Court. Therefore, the question of whether the District Court erred in entering a verdict in this case in favor of Respondents is analyzed according to federal law and pursuant to Rule 49(b).

Federal law favors the harmonization of verdicts and answers to interrogatories wherever it is reasonably possible. *Turyna*, 83 F.3d at 181; *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962) (where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way); *EEOC v. Century Broadcasting Corp.*, 957 F.2d 1446, 1460 (7th Cir. 1992) (when faced with apparently inconsistent verdicts, we are required to reconcile them, if possible, rather than overturn them.) In paragraph Third of Verdict Form D, the jury was instructed to identify the percentage of fault attributable to the parties, including the Petitioner. The jury was also instructed to enter zero if they found any Respondent not liable to the Petitioner. In particular, Verdict Form D provided that "if you find any defendant not liable to the plaintiff . . . then you should enter a zero (0) as to that person or persons." In accordance with the instruction and consistent with the evidence in the case, the jury entered a zero with regard to Respondent finding that it was not liable to the Petitioners.

Petitioners suggest that the language of Verdict Form D regarding apportionment of fault applies only to the contribution action by Respondents against Nascote.

However, Petitioners ignore the fact that the verdict form was specifically designed to combine the jury's consideration of comparative negligence, joint and several liability, and contribution. Prior to the adoption of these verdict forms, two separate forms of verdict were used in cases involving a simultaneous claim by a plaintiff and claims for contribution: (1) the plaintiff's verdict form set out the amount of damages and the percentage of the plaintiff's comparative negligence; and (2) the contribution verdict form asked the jury to allocate fault among all the contribution parties, with that fault adding up to 100 percent. The present verdict form was designed to eliminate the need for separate calculations or allocations of fault by the jury.

The allocation of fault in Verdict Form D therefore amounts to a special interrogatory. Paragraph Third of Verdict Form D, in and of itself, constituted a definitive determination of who was at fault and the percentage of each party's relative fault. The jury was first instructed to assess the relative percentages of fault of "all persons or entities whose fault proximately caused plaintiff's injuries . . . ," including the plaintiff, any defendant and any third party defendant. Further, the jury was told that if any defendant was "not liable to plaintiff . . . then you should enter a zero (0) as to that [defendant]."

Therefore, based upon the evidence adduced at trial the jury's specific finding in favor of Respondent was not against the manifest weight of the evidence. Further, the District Court properly construed the dictates of Rule 49(b) by entering judgment in accordance with the interrogatory answer, which controls the general verdict. Therefore, the Seventh Circuit's decision upholding the

judgment in favor of Respondent is sound and is not a departure from the accepted and usual course of judicial proceedings, nor is it in conflict with this Court's decisions or the decision of other United States appellate courts.

CONCLUSION

Petitioners fail to establish any basis for granting the Petition. This case does not present a situation where a United States court of appeals has rendered a decision in conflict with this Court's decisions or the decisions of another United States court of appeals. In addition, neither the District Court nor the Seventh Circuit have departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory authority. The opinions by the District Court and the Seventh Circuit are entirely consistent with the precedent of this Court and the other circuits, and the Petition is a mere attempt by Petitioners to seek review of a perceived erroneous factual finding and a perceived misapplication of a properly stated rule of law.

Based upon the foregoing, Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DOUGLAS S. DOVE
Counsel of Record
MICHAEL J. PITZER
RABBITT, PITZER & SNODGRASS, P.C.
800 Market Street, Suite 2300
St. Louis, Missouri 63101
(314) 421-5545
Counsel for Respondent
Durr Industries, Inc.